Filed 7/5/18 P. v. Guerrero CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. FABIOLA GUERRERO, Defendant and Appellant.	A151914 (Marin County Super. Ct. No. SC191528A)

Fabiola Guerrero (appellant) was charged with several crimes relating to her altercation with a woman who previously dated her boyfriend. Ultimately, she pleaded guilty to assault by means likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(4))[1] and was sentenced to probation. In this court, appellant contends that a condition of her probation authorizing searches of her electronic devices is overbroad and must be modified. We disagree, and affirm the order.

I. FACTUAL BACKGROUND[2]

In November 2014,[3] appellant was dating Eduardo Alvarez. Alvarez and a woman named Natalie have a child together.

[1] Subsequent statutory citations are to the Penal Code unless otherwise indicated.

[2] Absent a trial record, we take these facts from two sources: the affidavit that was used to secure appellant's arrest warrant; and the probation officer's report, which was prepared after appellant entered her plea.

[3] All date references in this factual summary are to the 2014 calendar year.

On November 19, appellant called Natalie from Alvarez's phone and told her that if she ever called Alvarez again, appellant would beat her. Natalie responded that she needed to have contact with Alvarez because they share a child. Some time after that phone call, appellant and Alvarez had an argument about Natalie, which led to them breaking up. On November 20, Alvarez called Natalie and warned her that appellant intended to go to Natalie's work the following day and start a fight with her. Natalie was concerned by this warning but she did not call the police.

On November 21, at around 7:50 p.m., Natalie walked to a parking lot behind her place of work and was about to get in her car when she was attacked by appellant and two women she did not recognize. Appellant knocked Natalie to the ground, got on top of her, pulled her hair, and punched her in the face several times. One of appellant's friends participated in the attack while the other recorded it on a cell phone or some other device. Then appellant took Natalie's purse and another bag of items from Natalie's car and left.

On the evening of November 21, Natalie reported the attack to the police. Officers took photographs of the visible injuries to her face and itemized the property appellant had stolen, assigning it a total value of $1,681. The police also arranged for Natalie to call Alvarez, with the plan of gathering information about appellant and her friends. Alvarez gave Natalie appellant's address and Facebook account name, but said she changed her phone number and he did not know it.

On November 22, appellant sent an Instagram message to Natalie's sister asking for Natalie's phone number, which the sister provided. Then appellant called Natalie and warned that if she pressed charges, appellant would not return her property. Appellant also warned that even if she went to jail, her friends would "go after" Natalie and "things will only get worse."

On November 24, Natalie created an Instagram account so that she could exchange messages with appellant about the attack. Then Natalie showed the police messages from appellant admitting what she had done to Natalie. Natalie also shared an intimidating phone message appellant left for her.

II. TRIAL COURT PROCEEDINGS

A December 2014 complaint charged appellant with three felonies arising out of the November 21 attack. Count one charged appellant with second degree robbery (§ 211), count two charged her with assault by means likely to cause great bodily injury (§ 245, subd. (a)(4)), and count three charged her with dissuading a witness (§ 136.1, subd. (c)(1)). The complaint further alleged that the count one and three charges qualified as serious and/or violent felonies under several sentence enhancement statutes. (§ 667.5, subd. (c); § 1192, subd. (c); § 1170.12, subd. (a)–(c).)

In May 2017, appellant entered a guilty plea to the count two felony assault pursuant to a negotiated disposition that she would be placed on probation and the other two charges would be dismissed. After the court accepted appellant's plea, it granted the People's motion to dismiss counts one and three, and referred the matter for preparation of a probation report.

On July 5, 2017, the matter was called for sentencing. The court received a probation report prepared for appellant, which proposed several terms and conditions, including a "no contact" condition, which stated: "Defendant ordered not to contact, call or otherwise communicate with victim(s) during probationary period." The department also proposed the following electronic search condition: "Defendant shall submit to search of all electronic devices, including cell phones and computers at any time of the day or night by any law enforcement officer, probation officer, or mandatory supervision officer, with or without a warrant, probable cause or reasonable suspicion over which the defendant has control over or access for electronic communication. Defendant must provide access/passwords to any electronic devices, computers, cell phones, accounts and applications to any law enforcement officer, probation officer, or mandatory supervision officer."

At the July 2017 hearing, appellant's trial counsel objected to the electronic search condition proposed by the department as both unreasonable under *People v. Lent* (1975) 15 Cal.3d 481, and unconstitutionally overbroad. Counsel argued that the search condition implicated appellant's significant constitutional rights and that "electronic

search device terms are not permissible in a case like this where there's really no connection between electronic devices and the crime of conviction." Counsel elaborated that there was no evidence appellant used a cell phone or electronic device to commit the assault, and pointed out that it was Natalie who created an Instagram account for the sole purpose of communicating with appellant.

After the matter was submitted, the court stated: "What I intend to do is carve out this search condition with respect to electronic devices to allow Probation to review any electronic devices to look at call log histories, as well as any social media, and that is because of the use of social media, as well as the mobile phone device to contact the victim, regardless of what the victim—whether the victim had a legitimate account or a fake account that she set up. [¶] Additionally, what I see is that with respect to the protective order, which I intend to issue in this case, that would be a condition prohibiting any contact. And I need to give Probation the ability to make sure that the defendant is abiding by that term and condition."

Before pronouncing appellant's sentence, the court addressed other objections raised by appellant's counsel, sustaining some and rejecting others. Then the court ordered that imposition of sentence was suspended and placed appellant on three years' probation. The court made a record of the terms and conditions of probation, which included the following:

"You will be subject to search and seizure of any electronic devices, including cell phones, which would include social media. It will be limited to social media and call logs and text messaging and email. You must turn over any passwords with respect to those means of communication and provide that information to law enforcement or any probation officer. [¶] And then with respect to those means of communication, you're waiving the specific consent and warrant requirements as set forth in Penal Code Section[s] 1546 and 1546.1."

Appellant's trial counsel renewed her objection to this condition, stating: "It wasn't clear to me if you departed in any way from what was proposed in the probation report. You called it carving out an exception, but it didn't sound like that." The court

responded that it was not giving the probation department "carte blanche" to search appellant's devices and computer files and documents, but rather was "limiting the search to media communication which would include social media, the actual phone, and then texting and emails."

III. DISCUSSION

Appellant has abandoned her claim that the electronic search condition imposed on her is unreasonable under *People v. Lent*, *supra*, 15 Cal.3d 481. However, she contends this search condition must be modified because it infringes on her constitutional right to privacy as recognized in *Riley v. California* (2014) 573 U.S. ___, 134 S.Ct. 2473 (*Riley*), and it is not narrowly tailored to the purpose for which it was imposed.

" '[P]arolees and probationers retain some expectation of privacy, albeit a reduced one.' [Citation.] The California Supreme Court has determined that 'probation search conditions serve to promote rehabilitation and reduce recidivism while helping to protect the community from potential harm by probationers.' [Citation.] As a probationer, defendant's diminished expectation of privacy is 'markedly different from the broader privacy guaranteed under the Fourth Amendment to individuals who are not serving sentences or on grants of probation.' [Citation.] 'It is that preconviction expectation of privacy that was at issue in [*Riley*], where the United States Supreme Court announced the general rule that police may not conduct a warrantless search of a cellular phone seized incident to an arrest. [Citation.]' [Citation.]" (*People v. Maldonado* (2018) 22 Cal.App.5th 138, 144, rev. granted 6/20/2018, S248800.)

Furthermore, our Supreme Court has "observed that probation is a privilege and not a right, and that adult probationers, in preference to incarceration, validly may consent to limitations upon their constitutional rights—as, for example, when they agree to warrantless search conditions. [Citations.]" (*People v. Olguin* (2008) 45 Cal.4th 375, 384.) Nevertheless, a " 'probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.' [Citations.]" (*Ibid.*)

" 'The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.' [Citation.] [¶] With respect to the standard of review, while we generally review the imposition of probation conditions for abuse of discretion, we review constitutional challenges to probation conditions de novo. [Citation.]" (*People v. Appleton* (2016) 245 Cal.App.4th 717, 723 (*Appleton*).)

Here, appellant contends that the electronic search condition imposed on her is overbroad because it is not closely tailored to the trial court's stated purpose for imposing the condition, which was to monitor appellant's compliance with the no-contact order. To correct this perceived error, appellant contends the condition must be modified to authorize searches of her devices only for "evidence that appellant had violated the no-contact order." Both prongs of this claim are erroneous.

At the sentencing hearing, the trial court gave two related but distinct reasons for imposing the electronic search condition: (1) appellant used a mobile phone device and social media to contact the victim; and (2) the probation department would need access to appellant's devices to ensure compliance with the no-contact order. Thus, contrary to appellant's position on appeal, the purpose of the search condition is not just to ensure that appellant complies with the no-contact order, but also to ensure that she does not use her phone and social media to engage in criminal behavior. Furthermore, appellant overlooks the fact that the trial court did explicitly tailor the electronic search condition by limiting searches to "social media and call logs and text messaging and email," which are the modes of communication that would need to be monitored in order to ensure that appellant is complying with the no-contact order.

Appellant relies on inapposite authority involving overbroad electronic search conditions. (*People v. Valdivia* (2017) 16 Cal.App.5th 1130 (*Valdivia*); *Appleton*, *supra*, 24 Cal.App.4th 717; *In re P.O.* (2016) 246 Cal.App.4th 288, rev. granted 2/14/18, S245893 (*P.O.*).) In *Valdivia*, for example, there was no evidence that " 'electronic

devices played any role in the underlying criminal conduct.' " (*Valdivia*, at p. 1145.) "Moreover, there was nothing in the record to demonstrate that defendant 'use[d] electronic devices for wrongful purposes in the past.' Essentially, the record . . . showed only that defendant physically assaulted his wife on a single occasion." (*Ibid.*) Furthermore, "the People did not seek, nor did the trial court issue, a protective order prohibiting defendant from having contact with his wife." (*Ibid.*) Under these circumstances, the *Valdivia* court could not find a "substantial reason for believing that evidence of future criminal activity by defendant [was] likely to be found on electronic storage devices under his control." (*Ibid.*) By contrast, in this case appellant used electronic devices to threaten Natalie, to record the felony assault, and to dissuade Natalie from contacting police.[4] Furthermore, appellant is subject to a no-contact order. Thus, there is a substantial reason for believing that evidence of appellant's future criminal activity may be found on electronic storage devices under her control.

In *Appleton*, *supra*, 245 Cal.App.4th 717, the defendant was convicted of false imprisonment by means of deceit, placed on probation, and subjected to a search condition, which provided: " 'Any computers and all other electronic devices belonging to the defendant, including but not limited to cellular telephones, laptop computers or notepads, shall be subject to forensic analysis search for material prohibited by law.' " (*Id*. at pp. 719, 721.) The Court of Appeal found that this condition was overbroad because it would "allow for searches of vast amounts of personal information unrelated to defendant's criminal conduct or his potential for future criminality." (*Id*. at p. 727.) The *Appleton* court also found that a narrower condition could serve the state's purpose of monitoring whether defendant was using "social media to contact minors for unlawful purposes," for example, by requiring the defendant to provide his probation officer with passwords to his social media accounts so they could be monitored. (*Ibid.*)

[4] When appellant pleaded guilty to felony assault, she acknowledged and agreed that "the sentencing judge may consider the facts and circumstances underlying dismissed counts in determining the appropriate sentence . . . ."

In *P.O.*, *supra*, 246 Cal.App.4th 288, a juvenile ward was subjected to a probation condition authorizing searches of his cell phone data and electronic accounts. This condition was overbroad because the purpose of the condition was "to allow monitoring of P.O.'s involvement with drugs," but the authorization to search was not limited to the types of data that would achieve this purpose. Instead, the appellate court found, it would permit "review of all sorts of private information that is highly unlikely to shed any light on whether P.O. is complying with the other conditions of his probation, drug-related or otherwise." (*P.O.*, at p. 298.)

In contrast to *Appleton* and *P.O.*, the electronic search condition of appellant's probation limits the types of data that may be searched to her phone call logs, text messages, e-mail, and social media accounts, which are the types of tools she used to commit her crimes. This electronic search condition is not overbroad because it "is tailored and limits the types of data that may be searched." (*In re Juan R.* (2018) 22 Cal.App.5th 1083, 1094.)

IV. DISPOSITION

The probation order is affirmed.

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SMITH, J.*

We concur:

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STREETER, Acting P. J.

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REARDON, J.

* Judge of the Superior Court of California, County of Alameda, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.